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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957.

No. 487

NORTH COUNTIES HYDRO-ELECTRIC COMPANY,
*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

*To the Honorable, the Chief Justice and the Associate Justices of The Supreme Court of The United States:*

North Counties Hydro-Electric Company, Petitioner, respectfully prays for the issuance of a writ of certiorari to review the decision of The United States Court of Claims, rendered May 8, 1957.

## OPINIONS BELOW.

The opinion of the Court of Claims from which review is sought is reported in 151 F. Supp. 322. The opinion of the Court of Claims in a former action between the same parties is reported in 108 Ct. Cls. 470. Copies of the opinions are attached hereto as Appendix 1 and 2 respectively.

## STATEMENT AS TO JURISDICTION.

The judgment of the Court of Claims dismissing petitioner's petition was entered May 8, 1957. (Rec. 47.) Petitioner filed a motion for rehearing which was overruled July 12, 1957. (Rec. 51.)

Petitioner believes that 28 U. S. C. A. sec. 1255 confers on this Court jurisdiction to review the judgment in question.

## QUESTION PRESENTED FOR REVIEW.

Whether the Government can invoke *res judicata* to deny the owner of a power plant his day in court to prove the taking of its property by *recurrent* floodings caused by a Government dam, where the prior judgment was entered before there had been recurrent floodings, and was based on the ground that one flooding did not constitute a taking.

## CONSTITUTIONAL PROVISION INVOLVED.

This action is for a taking of petitioner's property, brought under the Fifth Amendment to the Constitution of the United States, which provides in part:

> "• • • nor shall private property be taken for public use, without just compensation."

## STATEMENT OF THE CASE.

Petitioner, an Illinois corporation, owns a dam and hydro-electric power plant on the Fox River at Dayton, Illinois, about six miles above the confluence of the Fox and Illinois Rivers at Ottawa. In 1933 the United States placed in operation the Starved Rock Dam across the Illinois River about eight miles below Ottawa. The effect of the Starved Rock Dam was to create a backwater pool extending up the Fox River to within about 3 miles of petitioner's power plant.

The area involved is in northern Illinois and often experiences severe winter weather. Under such conditions, the backwater pool of the Starved Rock Dam freezes over, impeding and preventing the normal flow and passage of water, ice and debris that would, were it not for the obstruction, pass out into the Illinois. In 1943, with the pool frozen over, an ice jam commenced at the upper limit of the pool and, augmented by additional ice and debris from upstream, eventually built back up the river about three miles to petitioner's power plant, flooding it and putting it out of commission for six weeks.

Petitioner thereupon brought suit against defendant in the Court of Claims on the ground of a taking under the Fifth Amendment. After a trial on the merits the Court dismissed the petition, stating in 108 C. Cls. 470 at 485:

> "It is clear under the authorities that the flooding of an owner's land on but one occasion does not constitute a taking. Before there can be a taking a servitude must have been imposed upon the land, that is to say, a subjection of the land for a more or less definite time to a use inconsistent with the rights of the owner." (See Appendix 2.)

In 1946 an ice gorge caused by the Starved Rock Dam caused a substantial loss of power because of a decreased effective head of water necessary for the production of power. In 1952 a similar ice gorge occurred, flooding and damaging the plant, whereupon petitioner instituted the instant suit. After a trial on the issue of liability before a Commissioner, he held defendant liable, finding at page 8 of his opinion (Rec. 32):

> "The existence of a permanent servitude was not an established fact until, at the very earliest, the occurrence of the ice jam in 1952."

The Commissioner further found, at page 20, Par. 14 (Rec. 44):

> The existence of the Starved Rock pool 2.5 miles

up the Fox River creates a situation whereby, when the pool is frozen over, ice descending the Fox River need accumulate for only 3.25 miles before it reaches Dayton and can affect plaintiff's powerplant. Were the Starved Rock pool nonexistent, the accumulation of ice descending the Fox River (assuming it met an obstruction at the mouth and not before) would have to encroach upstream for about 5.75 miles before reaching Dayton where it could affect plaintiff's powerplant. It is reasonable to anticipate that ice jams similar in degree to those occurring in 1943 and 1952, and sufficient to damage plaintiff's powerplant correspondingly, will recur on the average of every ten years in the future so long as the Starved Rock dam creates the existing pool up the Fox River. It is also anticipated that, in addition, on the average of once every five years, lesser ice jams, aggravated by sheet ice formations over the Starved Rock pool, will cause temporary curtailments in the power output of plaintiff's plant without damaging the plant itself or causing it to cease operations.

Upon exceptions to the Commissioner's report, the Court of Claims sustained defendant's plea of *res judicata* and dismissed the petition, thus ignoring the findings of fact of the Commissioner who had heard the evidence, and denying petitioner its day in court. (See Appendix 1.)

## BASIS OF FEDERAL JURISDICTION.

Original jurisdiction in the Court of Claims is derived from 28 U. S. C. A. sec. 1491.

## ARGUMENT.

### The Decision of the Court of Claims Is Inconsistent With the Decisions of this Court and With Established Federal Law.

A uniquely apposite precedent and one which should be decisive of the question here presented was decided by this Court in *Portsmouth Harbor, Land and Hotel Co.* v. *United States*, 260 U. S. 327. This was the *third* of a series of cases all involving the question as to whether the intermittent firing of United States coast defense guns over plaintiff's land constituted a taking. The earlier cases were *Peabody* v. *United States*, 231 U. S. 530 and *Portsmouth, etc.* v. *United States*, 250 U. S. 1. The plaintiff (same in each instance) was the owner of hotel resort property on the ocean near Portsmouth Harbor, Maine. On land adjacent the Government had placed a battery of coast defence artillery. At infrequent intervals the guns were fired, the projectiles going over plaintiff's property.

After the first firing the plaintiff brought suit in 1905 in the Court of Claims on the grounds of a taking, but its petition was dismissed. See *Peabody* v. *U. S.*, 231 U. S. 530. Subsequently the guns were fired and again plaintiff brought suit. See *Portsmouth* v. *U. S.*, 53 C. Cls. 210. The Court of Claims again rejected the claim, which action was affirmed by this Court in *Portsmouth* v. *U. S.*, 250 U. S. 1.

In 1920 the guns were again fired and occasioned the third suit. The Court of Claims sustained the Government's demurrer to the petition and dismissed the action. On appeal the Government in its brief* relied upon the defence that the decisions in the former cases constituted

*Brief for the United States, No. 97, 1922 Term, pages 13-14.

*res judicata*. The plaintiff however, contended as stated by this Court, 260 U. S., at page 328:

> "But it is urged that the cumulative effect of later acts added to those that have been held not enough to establish a taking leads to a different result."

This contention was adopted by this Court which reversed the judgment of the Court of Claims and remanded the case for trial on the merits. In so doing, this Court in an opinion by Mr. Justice Holmes said, at page 330:

> "The fact that the evidence was not sufficient in 1905 does not show that it may not be sufficient in 1922"

and also said at page 330:

> "The repetition of those acts through many years and the establishment of the fire control may be found to show an abiding purpose to fire when the United States sees fit, even if not frequently, or they may be explained as still only occasional torts. That is for the Court of Claims when the evidence is heard."

It is clear that this Court by its action denied the claim that the former decision created the bar of *res judicata*. Further, applying the rationale of this Court's reasoning in the *Portsmouth* case to the case at bar, we submit that this Court should in considering this petition for certiorari hold that "The fact that the evidence was not sufficient" in the former case based on the 1943 flood, "does not show that it may not be sufficient" after the flooding in 1952. Accordingly, the case should be remanded to the Court of Claims for consideration of the evidence and the findings of its Commissioner that petitioner is entitled to just compensation for the taking of its property.

In the former action between the parties, *North Counties Hydro-Electric Co.* v. *United States*, 108 C. Cls. 470, based on the first flood the Court said, at 485, in dismissing the petition:

> "It is clear under the authorities that the flooding

> of an owner's land on but *one* occasion does not constituting a taking." (Emphasis ours.)

Obviously this objection went to the very heart of the action, *i. e.*, a finding that the essential elements of a taking were not then in existence. That the Court there considered the action premature is clearly borne out by its language immediately following the sentence above quoted:

> "Before there can be a taking a servitude must have been imposed upon the land, that is to say, a subjection of the land for a more or less definite time to a use inconsistent with the rights of the owner."

The use of the word "before" in defining the elements of a taking indicate beyond doubt, that in the Court's mind more than a *single* flooding was a *sine qua non* to the accrual of such a cause of action, and that lacking the fact of more than one flooding, the cause of action had not then matured or come into being.

Petitioner's present claim is not based on the single flooding in 1943, but is based on the taking of its property by reason of *recurrent* floodings. The Commissioner hearing the evidence found that these floodings caused by the Starved Rock Dam will recur periodically and have caused a reduction in the value of petitioner's property. Nevertheless, the Court of Claims denied petitioner its day in court on the claim and dismissed the case on the technical plea of *res judicata*.

The decision, from which review is here sought, is inconsistent and at variance with the doctrine enunciated by this Court in *United States* v. *Dickinson*, 331 U. S. 745, which, like the case at bar, involved the taking of property by reason of recurrent flooding caused by a Government dam. While the question actually decided was the application of the statute of limitations, nevertheless this Court, speaking through Mr. Justice Frankfurter, apparently deemed

it of importance to delineate a sweeping rationale of the subject of the taking of private property by the Government—when it occurs, what it consists of, and the rights and liabilities or the landowner. In saying, at page 748:

> "The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die."

this Court suggests that the prime consideration is the "principle of fairness" to the landowner, and that technical niceties of procedure should be subordinated to the end that justice may be done. Here, because petitioner was hasty in bringing the first suit, it has been denied its day in court on a most technical ground, with respect to which we submit all doubts and presumptions should be resolved in favor of petitioner.

This Court further said at page 749:

> "• • • The source of the entire claim—the overflow due to rises in the level of the river—is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from treating such a process by postponing suit until the situation becomes stabilized. An owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck.
>
> When dealing with a problem which arises under such diverse circumstances procedural rigidities should be avoided. All that we are here holding is that when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to *premature* litigation to ascertain the just compensation for what is really 'taken.'" (Emphasis ours.)

Thus, the Court has declared:

1. That a taking "is not a single event" but is "continuous".

2. That suit properly should not be brought by the landowner "until the situation becomes stabilized."

3. That suit prior to such stabilization would be premature.

While this Court did not say in so many words that a premature action would not preclude a new suit after the taking had become complete we, however, submit that such implication follows from the opinion. This is borne out by this Court's statement, at pages 747-8:

> "The Government could, of course, have taken appropriate proceedings to condemn as early as it chose • • •. By such proceedings it could have fixed the time when the property was 'taken'. The Government chose not to do so. It left the taking to physical events, thereby putting on the owner the *onus* of determining the decisive moment • • • when the fact of taking could no longer be in controversy." (Emphasis ours.)

Since the "onus" of determining when the taking took place was thrust upon petitioner, it is only fair and equitable that petitioner should be given all benefit of doubt as respects the decisiveness and finality to be accorded the judgment in the former suit.

Under established federal law, the prior decision of the Court of Claims was not *res judicata*. In *Radick* v. *Underwriters at Lloyds, London*, 137 Fed. 2d 21 (C. C. A. 7), suit on an insurance policy was dismissed because certain conditions of the policy had not been complied with. The court said, at p. 24, in modifying the judgment:

> "Ordinarily, it might make no difference whether the dismissal was for one reason or another. • • • The cause of action had not yet accrued. This will not prevent the institution of another action when and if the plaintiffs can show the accrual of a cause of action against defendant."

The doctrine with respect to this well recognized exception to the application of the rule of *res judicata* is forcefully stated in Black on Judgments (1891), Vol. II sec. 714, as follows:

> "The dismissal of a suit, or judgment for the defendant, on the ground that it prematurely brought, the cause of action not having yet accrued, is universally held to be no bar to another action on the same demand after time has removed the objection. It is no adjudication of the merits; the most it decides is that the claim or demand was not *then* due or matured."

In 50 Corpus Juris Secundum 54, par. 628, it is said:

> "A judgment for defendant, on an order dismissing the action, for the reason that it was prematurely brought, will not bar another action for the same cause when the right of action becomes complete."

The gravamen of the former action was the 1943 flooding of plaintiff's power plant, which action was dismissed on the ground that one flooding does not constitute a taking. Since that decree, there has occurred a *new* development—the recurrent ice gorges that damage petitioner's power plant—which serve to create a cause of action by causing the former claim to ripen into a present actionable claim. In any event, no decree rendered in 1947 on the 1943 flooding can conceivably be held to stand as a bar to the present action based on the recurrent floodings proved before the Commissioner in the present case.

This logical rule of exception to the principle of *res judicata* is well stated in 50 *Corpus Juris Secundum* 180, par. 712, as follows:

> "The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a re-examination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants."

## CONCLUSION.

Since this type of case must be brought in the Court of Claims, conflicts among the circuits would not be expected to develop as a ground for certiorari. The Court should grant certiorari because the result below is in conflict with its own decisions in *Dickinson* and *Portsmouth*. Cf. *U. S. v. Foley*, 329 U. S. 64, 65. It is necessary that this Court protect property owners from the injustice of technical defenses invoked by Government, as this Court has been alert to do in the past.

If this Court should not consider it desirable to devote time to oral argument of this case, the just action is to grant its Writ of Certiorari, reverse summarily the Court of Claims' order of dismissal on the authority of the *Dickinson* and *Portsmouth* cases, and remand the case to the Court of Claims for consideration of the merits of petitioner's claim.

Respectfully submitted,

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## APPENDIX 1.

IN THE UNITED STATES COURT OF CLAIMS

No. 268-53

(Decided May 8, 1957)

NORTH COUNTIES HYDRO-ELECTRIC COMPANY
v. THE UNITED STATES

*Mr. John W. Day*, for plaintiff.

*Mr. Ralph S. Boyd*, with whom was *Mr. Assistant Attorney General Perry W. Morton*, for defendant.

ON DEFENDANT'S PLEAS OF RES ADJUDICATA AND STATUTE OF LIMITATIONS.

WHITAKER, *Judge*, delivered the opinion of the court:

This is an action by plaintiff for the taking of its hydroelectric power plant on the Fox River in Illinois. It is before us on defendant's pleas of *res adjudicata* and the statute of limitations and its answer, and the trial commissioner's findings of fact, opinion, and recommendation for conclusion of law.

On October 19, 1953, plaintiff filed a motion to strike defendant's defenses of *res adjudicata* and the statute of limitations. We overruled this motion because the defenses sought to be stricken were neither trivial nor plainly without merit. We did not pass on the merit of the defenses. (Our opinion is reported in 127 C. Cls. 467.)

We now proceed to consider the defense of *res adjudicata*.

The theory of plaintiff's suit is that by the erection of the

Starved Rock dam on the Illinois River, completed in 1932, defendant created a condition that caused ice jams to form below plaintiff's dam on the Fox River, which, in the nineteen years between the time the pool behind the dam had reached its full elevation in February 1933 and January 1952, had so impeded the flow of the Fox River that plaintiff's power house was twice flooded, in 1943 and 1952, and put out of operation for brief periods, and that such floods will inevitably recur at intervals of approximately every ten years.

After the flooding in March 1943, plaintiff brought an action alleging a taking of its property. We denied recovery on two grounds: first, because it had not been proven that the ice jams were caused by the Starved Rock dam; and, second, because plaintiff had not shown that it was inevitable for these ice jams to recur. See *North Counties Hydro-Electric Co.* v. *United States*, 108 C. Cls. 470.

In order to show a taking by defendant, it was necessary for plaintiff to prove both of these facts. It proved neither. Now, after a second flooding ten years later, it brings the identical action, again alleging the defendant, by the erection of the Starved Rock dam, took its property. In this action it is necessary for it to prove the same things it had to prove in the former litigation, to wit, that the Starved Rock dam caused the ice jams and the consequent floodings, and that such floodings will inevitably recur.

The only difference in the facts now known and those known when the former case was tried is that now the power house has been flooded again. But this does not prove plaintiff's case. Two floodings, one ten years after the pool behind the dam was completely full, and the other nineteen years after, do not constitute a taking. *United States* v. *Cress*, 243 U. S. 316; *Peabody* v. *United States*, 231 U. S. 530; *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 250 U. S. 1; *Portsmouth Harbor Land & Hotel Co.*

v. *United States*, 260 U. S. 327; *Sanguinetti* v. *United States*, 264 U. S. 146, 149; *United States* v. *Causby, et al.*, 328 U. S. 256. Cf. *Camp Far West Irrigation District* v. *United States*, 107 C. Cls. 263. It is necessary for plaintiff to show that such floodings will inevitably recur.

Let us suppose it to be a fact that no further floodings will recur. Then certainly there has been no taking, although there has been damage. In the first case, as in this, it was necessary to show the inevitability of the recurrence of these floods. Intervening events have made this no more possible now than it was then.

Plaintiff has had its day in court and, under the rule of *res adjudicata*, it cannot again litigate the same issue heretofore tried in the same cause of action against the same defendant.

Our decision between the same parties, reported in 127 C. Cls. 467, is not to be taken as intimating any opinion one way or the other on this question. That decision was on plaintiff's motion to strike defendant's pleas of *res adjudicata* and the statute of limitations. These motions were denied solely on the ground that a motion to strike can be sustained only when the plea is trivial or plainly without merit. We stated expressly: "We do not pass on the merits of the defense at this time, except to say that it is not a trivial defense; it is not one to be cast aside as plainly without merit."

We thought it had merit, but we did not think the time had come to pass on this question. Perhaps we should have, and saved the parties and the court useless trouble and expense; but we did not.

By what we have said above, we do not mean to say that plaintiff is not also barred from again trying the first issue, that the Starved Rock dam caused the ice jam. This issue was tried in the first action and was decided adversely to

plaintiff for failure of proof. But an insufficiency of evidence to prove a material issue in the former litigation does not permit litigating the same issue in another action on the same cause of action against the same defendant.

The trial commissioner says this rule does not apply where the former action was premature, but we cannot say that the former action was premature. It was brought more than ten years after the pool behind the dam was full, and after all of the effects of the erection of the dam should have been either fully known or foreseen. It was brought after the ice jam and flooding in 1943.

*United States* v. *Dickinson*, 331 U. S. 745, on which the Commissioner relies, does not say that a suit brought as soon as the Government dam is complete is premature; it says only that the owner may wait, not that he must wait, until he can determine the extent to which his property will be taken by the erection of the dam. This owner waited more than 11 years after the erection of the dam had been completed, and ten years after the pool behind it was full, and until the ice jam of 1943 and the flooding in that year. Its suit was not premature. Cf. *Columbia Basin Orchard* v. *United States*, 116 C. Cls. 348.

When plaintiff brought its suit it knew what it had to prove, and it thought it could prove it. It failed. Having had the day in court it had selected, it is not entitled to another. There must be an end to litigation some time, both for the sake of parties, and for the sake of other litigants who are demanding the attention of the court.

Defendant's plea of *res adjudicata* is sustained.

This action makes it unnecessary to consider the defense of the statute of limitations, and to again consider the case on its merits. For this reason, we make no findings of fact, in addition to those already found and reported in 108 C. Cls. 470, except to find as a fact that ice formed in the Fox

River below plaintiff's dam, and plaintiff's power plant was again flooded, on January 29, 1952, and operations were not resumed until February 17, 1952.

Defendant's plea of *res adjudicata* is sustained, and plaintiff's petition is dismissed.

It is so ordered.

LARAMORE, *Judge;* MADDEN, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

# APPENDIX 2.

IN THE COURT OF CLAIMS OF THE UNITED STATES,

No. 46274.

(Decided April 7, 1947)

NORTH COUNTIES HYDRO-ELECTRIC COMPANY VS. UNITED STATES.

*Mr. Edmund D. Adcock* for the plaintiff.

*Mr. Marvin J. Sonosky*, with whom was *Mr. Assistant Attorney General David L. Bazelon*, for the defendant.

The facts necessary to a decision of the case are set out in the opinion; they are set out more in detail in the following

SPECIAL FINDINGS OF FACT.

1. Plaintiff is a corporation duly organized under the law of Illinois.

Since the organization of plaintiff corporation in 1925, its stock has been owned by Fred D. Breit and members of his family.

Plaintiff owns a hydroelectric water-power plant and development on the Fox River, near the town of Dayton, Illinois, consisting of a dam across the Fox River about 5.75 miles north and upstream from the mouth of the Fox River at Ottawa, Illinois, head race, power plant with generators and a tail race from the power plant to the Fox River below the dam, real estate in and along the Fox

River and rights of overflow of other lands for approximately 4½ miles upstream from the dam.

2. Plaintiff's dam across the Fox River is about 615 feet long and 26 feet in height, built of concrete, resting upon the bed rock of the Fox River. The crest elevation is 506.45 Memphis Datum* and during the summer months when flash boards are added the crest is about 507.3 feet Memphis Datum. The base of the dam is at elevation 480.0 feet.

The water of the Fox River used to operate the power plant, passes through a channel or head race about 900 feet long from a point near the west end of the dam and extends to the powerhouse. The pool caused by the Dayton dam extends about 4½ miles upstream, is upwards of 600 feet wide at the dam, and increases in width for a considerable distance and then follows the river channel.

3. All of the electricity produced by plaintiff's hydroelectric power development except an infinitesimal amount used in the maintenance and operation of the power plant is sold to the Illinois Power Company at a flat rate of a half cent per kilowatt hour under a contract dated December 20, 1923, and extending for forty years thereafter. The average annual output of the power plant for the years 1926 to 1942, both inclusive, has been 16,236,844 kilowatt hours, and the average annual gross earnings for the same period were $81,184.45.

The said water power development is so constructed and operated as to utilize (more particularly set forth hereafter), not only the dry weather flow of the Fox River, but also a certain percentage of the flow in excess of the low water flow.

*All elevations mentioned in these findings unless otherwise indicated are according to Memphis Datum; where elevations are given that are not Memphis Datum but refer to mean sea level, to convert same to Memphis Datum add 7.5 feet.

4. Plaintiff's power plant was duly licensed as project No. 287 by the Federal Power Commission on April 11, 1924, under authority of the Federal Water Power Act of June 10, 1920, 41 Stat. 1063, 16 USC sec. 791.

5. The Illinois River is formed by the confluence of the DesPlaines and Kankakee River near Dresden, Illinois, and flows in a westerly and southwesterly direction into the Mississippi River at Grafton, Illinois. The main channel of the Chicago Sanitary & Ship Canal extends from the West Fork of the South Branch of the Chicago River at Robey Street in Chicago in a southwesterly direction about 28 miles to the DesPlaines River at a point below the City of Lockport, Illinois, and is a navigable channel which forms a part of the Illinois Waterway.

Under the authority of the Rivers and Harbors Act of July 3, 1930, the Illinois Waterway, the construction of which had been begun by the State of Illinois, was taken over and the completion thereof was assumed by the United States. This waterway, as completed by the United States and now operated by it, consists of the said Chicago Sanitary and Ship Canal from Robey Street in Chicago to the Desplaines River near Lockport, thence along and in the DesPlaines and Illinois Rivers to the mouth of the Illinois River at Grafton, Illinois. The project depth of water for navigation as designed and planned provides a 9-foot navigable channel for the passage of watercraft. In the DesPlaines and Illinois Rivers the navigable channel so designed is maintained by the construction and operation of a series of dams which has raised the normal elevation of the water in such rivers. The said dams are equipped with Tainter gates which are raised and lowered depending upon the flow of water to maintain the pool elevation of water above the dams. When the flow of the river where a dam is located is sufficient to maintain pool level elevation without the Tainter gates in operation they are raised clear

of the water and the river then flows substantially as in a state of nature. The Tainter gates may be operated during the winter months as well as during the summer months.

6. The Starved Rock lock and dam of the Illinois Waterway is located in the Illinois River at Starved Rock, Illinois, about 8.7 miles downstream from the confluence of the Fox and Illinois Rivers at Ottawa. The dam is 1,280 feet long with a crest elevation of 466.5 feet Memphis Datum. The lock is 110 feet wide and 600 feet long. There are ten Tainter gates in the dam; there is no water power development at said dam.

This dam was completed in 1932 by the United States. By February 1, 1933 the water in the Starved Rock dam had reached project pool elevation of water of 466.5 feet at the dam. By March 1933 of the other pools of the Illinois Waterway above the Starved Rock dam had been filled with water to project elevation of water, and by June of 1933 the Illinois Waterway from Starved Rock to Chicago was officially open for navigation. The pool of the Starved Rock dam extends upstream from the Starved Rock dam approximately 13½ miles to the Marseilles dam, and embraces the area of the mouth of Fox River at Ottawa. This area at the mouth of the Fox River and to the Marseilles dam is known as the upper pool. The water level of Starved Rock pool is the same as the level of the Marsden pool next above it. Above the pool created by the Marseilles dam there are pools resulting from dams at Dresden Islands and Brandon Road near Joliet.

Starved Rock dam has been and now is operated and controlled by the United States in the interest of navigation, and is operated for such purpose throughout the year.

7. Since 1930 the diversion of water for sewage disposal by the Sanitary District of Chicago from the Great Lakes Waterway through the Chicago Drainage Canal and aux-

iliary channels to the DesPlaines River and thence to the Illinois River has been gradually reduced as a result of a decree entered by the Supreme Court of the United States on April 21, 1930 in the case entitled *Wisconsin, et al.*, v. *Illinois*, 281 U. S. 696. Prior to July 1, 1930 the diversion was about 8,000 c. f. s.* in addition to 1,700 c. f. s. domestic pumpage.** Under the terms of that decree the diversion was reduced as follows:

(a) To 6,500 c. f. s. annual average in addition to domestic pumpage of about 1,700 c. f. s. for the period from July 1, 1930 to December 31, 1935.

(b) To 5,000 c. f. s. annual average in addition to domestic pumpage of about 1,700 c. f. s. for the period from January 1, 1936 to December 31, 1938.

(c) To 1500 c. f. s. annual average in addition to domestic pumpage of about 1700 c. f. s. ever since January 1, 1939.

8. The Fox River rises in Waukesha County, Wisconsin, and flows in a southwesterly direction through Illinois until it empties into the Illinois River at Ottawa.

9. The Fox River from the plaintiff's dam at Dayton to its mouth about 5.75 miles (except in the lower portion of the backwater where the water is comparatively still), is a shallow, swift stream of varying depths depending upon the amount of flow in the Fox River due to the various conditions of rainfall and runoff.

The flow of the Fox River has ranged during the period from 1925 to 1944, both inclusive, during which plaintiff operated its power plant, from a low of 116 c. f. s. in September of 1944 to high flows as in March 1944 of 17,100 c. f. s. During the months of December to March of the

*The term c. f. s. refers to the number of cubic feet of water flowing past a given point in one second.

** Domestic Pumpage consists of water pumped from Lake Michigan by the City of Chicago and its environs for the domestic use of the City and its environs and is discharged into the Main Drainage Canal of the Sanitary District as treated sewage.

same period the low flow was 234 c. f. s. The mean flow of the Fox River for this same period (September 1925 to September 1944) was 1,460 c. f. s. On September 6, 1944 the head race gauge showed the water in plaintiff's head race to be 507.3 Memphis Datum and in the tail race the elevation of the water was 474.82. The head was, therefore, 32.48 feet. One the same day the Ottawa guage showed the surface elevation of the water of the Illinois River as 466.1 Memphis Datum or 8.72 feet below the tail race elevation on that day.

The Starved Rock dam raises the surface elevation of the Illinois, at low water flow, about 8.5 feet and backs the water up in the Fox from its mouth about 2½ miles. Without the Starved Rock dam in operation the fall between the plaintiff's tail race and the Illinois River at the mouth of the Fox would have been on September 6, 1944 about 17 feet.

The bed of the Fox River from the Dayton dam and the tail race to its mouth is rock.

10. The average flow of the Illinois River for the 21-year period from 1919 through 1940 was 12,550 c. f. s. and for the year from October 1939 through September 1940 was 5,808 c. f. s. The average flow for the years 1936, 1937, and 1938 was 11,300 c. f. s. With a flow of 10,000 c. f. s. above Ottawa and without the Starved Rock dam in operation, the river stage at the mouth of the Fox would be 458.5 feet or about 8 feet lower than the project elevation of 466.5 at the Starved Rock dam. With the dam in operation the stage would have been 466.5 plus. With a flow of 11,300 c. f. s. and the dam in operation the river stage in the Illinois above the mouth of the Fox would be 466.5 plus and without the dam in operation 459 feet. In order to have stage in the Illinois River at Ottawa of 466.5 without the Starved Rock dam in operation it would be necessary to have a flow in the Illinois above Ottawa of 40,000 c. f. s. which would

be considered high water or almost flood flow. In the past 26 years the flow has reached 40,000 c. f. s. in eleven years.

With the Starved Rock dam in operation and a flow in the Illinois River of 11,300 c. f. s. the backwater of the Starved Rock pool extends up the Fox River about 2½ miles. Without the dam in operation, there would be no backwater extending up the Fox River.

11. The normal head for the operation of plaintiff's water power development or the difference between the head race and tail race elevations of the water is about 29 to 30 feet. The flow of the Fox River at which plaintiff's water power development operates most efficiently is 1,800 c. f. s. Any occurrence or conditions of precipitation, runoff, flow or obstructions to flow which cause the elevation of the water in the tail race at plaintiff's power plant to rise so that the head is reduced below normal, results in injury and damage to the power plant in that it does not manufacture the electricity that it otherwise would.

12. Due to combination of physical and climatic conditions, the flow and passage of water in the Fox River in the stretch of said river below plaintiff's dam to the mouth has been and is subject to being obstructed by ice gorges. An ice gorge may be and is formed by an initial accumulation of sheet ice, that is, flat solid ice formed on a still body of water, or slush ice, which is an accumulation of small particles of ice, resembling wet snow, and which floats on top of open running water, together with debris. From the beginning of a formation, the ice gorge grows by accumulation of additional ice which packs against the gorge thus started and if the ice flowing in the stream is sufficient it may grow and pack and back up the stream for an indefinite distance, and thus remain obstructing the river flow until the gorge is broken up, usually through climatic or physical conditions or a combination of them. The presence of heavy sheet ice, that is, the river frozen over

combined with natural obstructions such as islands, bends and shallow water, would have an added tendency to promote the formation of an ice jam.

13. Beyond the upper limits of the backwater, depths of water of the Fox River are 3′, 4′, 5′, 5′, 5′; below island No. 4, depths of 3′, 7′, 4′, 4′, 5′, and 5′ running downstream. Proceeding up the river the soundings indicate an average depth of 3′. Up the stream near station 176 the depth is indicated to be 2′ to 2.7′. Farther up in the vicinity of the cluster of three islands, Nos. 5, 6, and 7, depths indicated are 4.1′, 2.1′, and 2.3′. The depth of the river on up is comparatively shallow.

14. The channel of the Fox River below the Dayton Dam is narrow generally almost to the mouth, except as enlarged by the backwater of the Starved Rock pool for about 2¼ miles. The Fox River is a shallow stream and has a number of short twists and turns as well as islands and bridges. For example:

(1) Eleven hundred feet below the Dayton Dam is a highway bridge with abutments in the river.

(2) About 10,770 feet below the Dayton Dam is a cluster of three islands.

(3) Beginning at those three islands the channel pursues an extremely tortuous winding course with two abrupt bends in the form of a letter U followed by an inverted U, thus ∽.

(4) About 16,990 feet from the Dayton Dam at the bottom of the first big bend or U, an island, Island No. 4, about 900 feet long, splits the channel.

(5) In the second big bend another island, Island No. 3, about 1,400 feet long, splits the channel about 2,200 feet downstream from the northerly tip of Island No. 4.

(6) Below Island No. 3, approaching the city of Ottawa are a highway bridge, railroad bridge and aqueduct, all with piers or abutments in the river.

These islands and the sharp twists in the Fox River, which extend about 3 miles above its mouth, form obstructions where ice may collect and either initiate or accentuate the formation of an ice gorge.

The diversion of the water from Lake Michigan by the Sanitary District of Chicago, as heretofore described in this report, correspondingly reduced the flow of the Illinois River. This reduction had practically no effect on the location or level of the backwater of Starved Rock pool, which as already described, at normal flows extended about 2½ miles up the Fox River.

15. Prior to March 3, 1943, and from March 3, 1943 for a considerable number of days, through a combination of climatic and physical conditions an ice jam or jams were formed in the Fox River, between the highway bridge at Ottawa and plaintiff's dam. Whether the ice throughout the extent of the river became solidified is not definitely established. However, a jam built up by slush ice coming over plaintiff's Dayton dam, was observed for a considerable distance down the river from plaintiff's dam, until it reached plaintiff's power plant, and beginning about March 3, 1943, such a jam caused portions of the powerhouse of the plaintiff to be submerged with water to such an extent that the plant ceased to operate from March 3, 1943 until April 16, 1943, and did not operate with full capacity until the early part of May 1943.

16. Since the beginning of the operation of plaintiff's plant on April 13, 1925, up to March 1943, no ice gorge or accumulations of ice had been formed in the Fox River below plaintiff's dam to such an extent that the operation of the plant was destroyed or to such an extent that damage was caused to apparatus and equipment in the power plant until the occurrence in 1943, although on a few occasions during those years, the effective head at the power plant

was lessened to some extent for a short time or times—February 1936; January 1937; February 1937; March 3, 1937; March 1939; March 4 and 5, 1940; February 1941; March 1941; February 1942; December 1942; January 7, 1943; January 1946.

17. December of 1942 was the coldest December in the preceding six years. Unseasonably low temperatures characterized the first three weeks followed by a reaction to comparatively mild weather during the latter third of the month. Beginning with December 3, 1942 the Starved Rock upper pool was frozen over for five miles, ice 1¼ inches thick; December 4 and 5 frozen over for 10 miles, ice 2½ inches thick, navigation channel filled with crushed ice; December 7, river frozen over for 10 miles, ice 3½ inches thick, channel filled with broken ice; December 8 river frozen over for 10 miles, ice 4 inches thick; December 9 river frozen over, ice 5 inches thick; December 14, 15, river frozen over, ice 6 to 8 inches thick, channel filled with heavy broken ice; December 16, 17, river frozen over for 12 or 14 miles, ice 9 inches thick, channel filled with heavy broken ice; December 18 heavy shore ice 6 to 8 inches thick, navigation channel filled with crushed ice for 7 or 8 miles; December 20, heavy shore ice 6 to 8 inches thick, navigation channel filled with heavy broken ice for 8 miles; December 21, 22, heavy shore ice 6 to 10 inches thick, navigation channel filled with heavy broken ice for 12 miles. During the rest of December along the Starved Rock pool shore ice continued 5 to 6 inches thick.

After the first week in January 1943 weather conditions were such that a certain amount of slush ice came over plaintiff's Dayton dam. The same occurrence happened late in February of 1943. There was also open river at Dayton both in the tail race and the Dayton pool. Temperature dropped causing slush ice to form and go over the Dayton dam drifting past the powerhouse downstream.

Slush ice is an accumulation of small particles which greatly resemble wet snow floating on top the open running water and is formed principally when the temperature of the water itself and the temperature of the air are low enough.

18. During January of 1943, it was observed by Mr. MacGrogan, plaintiff's plant manager, that there was broken sheet ice in the Illinois River near the mouth of the Fox River. This was observed approximately at the point on the aerial mosaic in evidence as plaintiff's exhibit No. 4, which is made a part of these findings by reference, indicated by a white square in which is printed Mile 239.7 in Ottawa.

Early in January 1943 also Mr. MacGrogan observed from the highway bridge over the Fox River about one-half mile from its mouth, marked "A" on the mosaic, broken ice being augmented by slush coming downstream, in which was mixed logs, trees, and rubbish, characteristic of the flowage over the dam at plaintiff's plant. From this highway bridge one could see approximately one-half mile upstream.

Plaintiff's next observation was from a point marked "O" on the mosaic at a bend in the Fox River, where a similar situation existed. Visibility at that point was nil downstream, and perhaps one-half mile upstream where slush was proceeding downward.

Plaintiff's next point of observation was at a point at the head of the next bend in the Fox River, marked "Retort," being the plant of the Chicago Retort and Fire Brick Company. A similar situation existed at this point, the area of visibility being limited. The area included in all three of these separate observations covered about 2 to 2¼ miles upstream from the mouth of the Fox River.

The only other definite point of observation was at the highway bridge over the Fox River approximately 400' be-

low plaintiff's Dayton dam, from which point visibility extended perhaps a mile downstream to a point marked "X" on the mosaic, where a similar situation as to accumulations of ice and slush existed and grew.

Plaintiff's remaining observations of the Fox River, from early February to shortly prior to the time of the damage to the plant, were general in nature, and were made by Mr. MacGrogan, as he drove along the highway going to and from Ottawa, from such points as he could see the river without leaving his automobile.

Later an accumulation was again observed from the highway bridge near the Dayton dam 400' below plaintiff's power plant to be about a half or three-fourths of a mile downstream from the highway bridge. This accumulation was later observed nearer the bridge, and at each observation it was coming nearer the bridge and finally it was observed when it got to the bridge and built up under the bridge near to the lower chord or tip of the clearance of the bridge, and was also observed upstream from the highway bridge, after it was observed downstream.

On March 8, 1943, the ice gorge or jam was observed both below and above the highway bridge near the Dayton dam. On the lower side of the bridge the ice was close to the lower chord of the bridge, and above the bridge the ice completely filled the area between the bridge and the dam from about the floor of the bridge to the top of the dam, and the ice on the upper side of the bridge was higher than on the lower side. The ice below the highway bridge at Dayton which was accumulated in the Fox River, as high as the lower chord of the bridge, started at some point or points downstream and built upstream to the bridge.

There is no satisfactory proof as to the condition of the river between the point marked "Retort" and the point marked "X" on the aerial mosaic. Mr. MacGrogan did not

make definite observations of the river between those points. The proof is insufficient to show that the ice jam which caused injury and damage to plaintiff's plant began at the backwater in the Fox River and then extended all the way up to plaintiff's plant.

19. For a period beginning with December 1942, the Starved Rock upper pool had been filled with ice a great deal of the time. The navigation channel had been kept open, but a considerable portion of the time it had contained a great deal of broken ice. For example:

From February 28 to March 2, 1943, the Illinois River was clear of ice. March 3 and 4, 1943, river was covered with ice ranging from 1 to 1½ inches in thickness. March 5 and 6, 1943, shore ice 1 to 1½ inches thick; channel filled with crushed ice. March 7, 1943, river frozen over for 12 miles with ice 1½ to 2 inches thick. March 8, 1943, channel full of broken ice 3½ inches thick for 10 miles. March 9, 1943, shore ice 2 to 4 inches thick; channel full of crushed ice. March 10 to 13, 1943, channel full of crushed ice, heavy running ice 3 inches thick. March 14 to 20, 1943, river clear of ice.

20. As the result of the ice jam and consequent flooding of plaintiff's plant in March of 1943, the plaintiff expended the sum of $34,988.04 in repairs. Of this sum, approximately $12,000 represented repairs of a nature not requiring repetition in the event of a similar flooding.

As a result of the shut-down in March and April of 1943, plaintiff suffered a loss of earnings of about $18,000. In the event of a similar flooding, and because of the repairs just referred to, plaintiff's loss of earnings would be about 40 percent less.

Whether there will be a periodical recurrence of the 1943 ice condition resulting in permanent damage to plaintiff's property is purely speculative.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is not entitled to recover and its petition is therefore dismissed.

Judgment is rendered against the plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

In 1925 plaintiff built a hydro-electric power plant on the Fox River near Dayton, Illinois, about 5¼ miles above where the Fox River empties into the Illinois River. In 1933 defendant built a lock and dam at a place called Starved Rock[1] on the Illinois River about eight miles below the mouth of the Fox River. The back water from this dam backs up into the Fox about 2¼ miles, which is about 3 miles below plaintiff's powerhouse.

Ten years after defendant's dam had been completed an ice jam formed on the Fox River below plaintiff's dam. The accumulation of slush ice behind this jam finally reached plaintiff's powerhouse, flooding it and putting it out of commission on March 3, 1943. This condition continued until April 16, 1943.

Plaintiff says that this ice jam and the flooding of its powerhouse was caused by the erection of defendant's dam at Starved Rock in 1933, that it is "probable" that there will be other jams which will flood its powerhouse and that,

1. This is a fortress-like rock about a half acre in size at its top, with a sheer drop of 140 feet to the river below. The story is that a band of Indians trapped and surrounded a rival band on the top of this rock and starved them into submission; hence, the name "Starved Rock."

therefore, it is entitled to recover for the impairment of the value of its plant under the Fifth Amendment to the Constitution.

For several reasons we do not think plaintiff is entitled to recover. We shall state two.

*First.* We do not think plaintiff has carried the burden of showing that the erection of the Starved Rock dam caused the ice jam that backed up into plaintiff's plant. Plaintiff's theory is that the erection of this dam caused a pool of comparatively still water in the Fox River, which was more apt to freeze over than running water. It says this pool did freeze over and that the slush ice coming down the river dammed up against the ice on this pool until its accumulations finally extended three miles up the river and into its plant. The formation of the pool, plaintiff says, was the thing that caused the ice jam.

The witness by whom plaintiff seeks to prove this was H. M. MacGrogan, its plant superintendent, whose testimony, it was agreed, would have been corroborated by two of its other employees had they been called to the stand. MacGrogan says that between the first of January and the latter part of February he observed the ice in the Fox River from four different points: (1) the bridge over the Fox River at United States Highway No. 6, which is about a mile above its mouth; (2) a point on the bank of the Fox River several hundred yards above this highway bridge; (3) from a place on the highway at the Chicago Retort & Fire Brick Company several hundred feet from the river bank; and (4) from the highway bridge about 400 feet below the plaintiff's powerhouse. We are of opinion that his means of observation from these points were not sufficient to enable him to give satisfactory testimony as to what caused the ice jam.

The Fox River is a shallow stream from 2 to 5 feet deep.

Its course between its mouth and plaintiff's dam is quite tortuous. About two miles below plaintiff's dam there are three small islands in the middle of the river. From here on to its mouth there are two particularly sharp bends and two others not quite so sharp. The first bend, coming down river from plaintiff's plant, is in the form of the letter U; the second, an inverted U; the third one, a U elongated at the top; and the last, an inverted U, also elongated at the top. At the bottom of the first bend, which is about opposite the plant of the Chicago Retort & Fire Brick Company, there is an island in the middle of the river about 900 feet long. About 2,200 feet farther downstream, and before the top of the next bend is reached, there is another island in the middle of the river about 1,400 feet long.

From the first two points of observation MacGrogan was unable to observe the river upstream beyond the second bend. From his third point of observation, from the highway opposite the Chicago Retort & Fire Brick Company, he could only see the river immediately in front of him, and that not well enough to testify accurately as to the condition of the ice. From the fourth point of observation on the highway bridge, about 400 feet below the dam, he could see the river for only about half a mile downstream.

Thus it is seen that MacGrogan was unable to testify as to the ice condition in the river around the first and second bends, in which there were these two large islands. His opportunity to observe the condition from the highway opposite the Chicago Retort & Fire Brick Company was quite limited, and he has no information at all as to the state of the river between this bend and about a half mile below the dam, which is a distance of about two miles. He is, therefore, unable to testify definitely that this ice jam began at the pool formed by the Starved Rock dam and extended all the way up to plaintiff's power plant.

He did testify definitely that he saw sheet ice and an accumulation of slush ice from the bridge at U. S. Highway No. 6, and he testified definitely that he saw an ice jam forming below the bridge adjacent to the powerhouse. This, however, leaves unaccounted for a stretch of water between the two, about three miles long, in which there were several objects capable of causing an ice jam: (1) the three islands about two miles below the dam; (2) the two bends in the river; and (3) the two large islands in the bends of the river.

The witness was unable to say whether the jam started at these three small islands, or at the islands in the bends of the river, or at the bends themselves, all of which were above the backwater formed by the Starved Rock Dam.

We do not think plaintiff has carried the burden of showing that the erection of the Starved Rock Dam caused the ice jam which flooded its plant. We think the commissioner was justified in finding: "The proof is insufficient to show that the ice jam which caused injury and damage to plaintiff's plant began at the backwater in the Fox River, and then extended all the way up to plaintiff's plant." We have, accordingly, adopted this as a part of our findings of fact.

*Second.* The commissioner has also found:

> Whether there will be a periodical recurrence of the 1943 ice condition resulting in permanent damage to plaintiff's property is purely speculative.

Plaintiff excepts to this and asks us to find the following in lieu thereof:

> It is probable that an ice condition similar to the 1943 gorge will occur once every ten or twelve years causing damage to plaintiff's plant • • •.

In support of this suggested finding we are cited to the testimony of Horace P. Ramey, a civil engineer and as-

sistant chief engineer of the Sanitary District of Chicago. Ramey is asked:

> When you say it might happen, [referring to the ice jam] do you mean exactly that way, or as to the probability of happening?

He answered:

> Well, it did happen, and you might get the same climatological conditions again, which would cause it to happen. So it is speculative, but it did happen once in twelve years. I also heard testimony about a similar jam in January, 1946.[2] I firmly believe that it can happen.

He further said:

> I think it probably will happen at some future time, and my best estimate is that it probably will happen, say, once in twelve years.

This falls far short of the rule stated in *United States* v. *Cress*, 243 U. S. 316, 328, upon which plaintiff relies, of a "permanent liability to intermittent but inevitably recurring overflows." The proof is entirely insufficient to show that it is inevitable for these ice jams to recur. Instead of their being inevitable, plaintiff's witness testifies that whether or not it will happen is speculative, although he says he thinks it will happen.

It is clear under the authorities that the flooding of an owner's land on but once occasion does not constitute a taking. Before there can be a taking a servitude must have been imposed upon the land, that is to say, a subjection of the land for a more or less definite time to a use inconsistent with the rights of the owner. *Peabody* v. *United States*, 231 U. S. 530; *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 250 U. S. 1; *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327; *Sangui-*

2. This jam did not reach plaintiff's plant.

*netti* v. *United States*, 264 U. S. 146, 149; *United States* v. *Causby et al.*, 328 U. S. 256. Cf. *Camp Far West Irrigation District* v. *United States*, 107 C. Cls. ..... .

In *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327, 328, 329, the court, speaking of *Peabody* v. *United States*, *supra*, and *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 250 U. S. 1, said:

> • • • In the first case it was decided that the mere erection of the fort and the fact that guns were fired over the claimants' land upon two occasions about two years and a half before the suit was brought, coupled with the *apprehension* that the firing would be repeated, but with no proof of intent to repeat it other than the facts stated, did not require the finding of an appropriation and a promise to pay by the United States. The second case was like the first except for "some occasional subsequent acts of gun fire." 250 U. S. 2, and the finding of the Court of Claims for the United States again was sustained. [Italics ours.]

The court further said:

> • • • There is no doubt that a serious loss has been inflicted upon the claimant, as the public has been frightened off the premises by the imminence of the guns; and while it is decided that that and the previously existing elements of actual harm do not create a cause of action, it was assumed in the first decision that "if the Government had installed its battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, *whenever it saw fit*, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made. 231 U. S. 538. That proposition we regard as clearly sound. [Italics ours.]

The parties disagree as to whether or not the Fox River is navigable, but we think this is immaterial, and we have made no finding on this fact. Whether navigable or not, we do not think plaintiff is entitled to recover. Its petition will be dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* and LITTLETON, *Judge,* concur.

WHALEY, *Chief Justice,* took no part in the decision of this case.